Supreme Court U. S.
FEB 26 1940
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No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRADFORD DYEING ASSOCIATION (U. S. A.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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215992—40——1

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The brief filed on behalf of respondent contains several assertions to which reply should be made.

I

THE T. W. O. C. WAS DESIGNATED AS THEIR BARGAINING REPRESENTATIVE BY A MAJORITY OF THE EMPLOYEES

1. Respondent contends (Brief, pp. 34–46) that the T. W. O. C. had no authority, under its rules and regulations (Bd. Exh. 33) and the contract between the C. I. O. and the United Textile Workers of America (Bd. Exh. 34) pursuant to which it was

formed, to accept respondent's employees as members prior to formation of a local union affiliated with the T. W. O. C. The documents referred to plainly do not support respondent's contention.[1] In any event, the argument is based upon the erroneous assumption that only employees who are members of a labor organization may designate it as their bargaining representative. Section 9 (a) of the Act speaks not of membership in a labor organization but of designation or selection of a representative, and the whole purpose of the election procedure authorized by Section 9 (c) is to permit employees, who may or may not be members of a labor organization, to select a rep-

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[1] The provision of the T. W. O. C. rules and regulations dealing with membership in the T. W. O. C. is Article V, set forth at pages 40–41 of respondent's brief. That article does not state that membership in a local union is prerequisite to membership in the national T. W. O. C. Rebutting any inference that such a prerequisite was intended is the wording of Section 6 of Article V:

> "'No foreman or forewoman or any other representative of the employer, shall be eligible to membership in local union *or in the Textile Workers Organizing Committee*." [Italics supplied.]

In our main brief (pp. 34–35) we have referred to the uncontradicted testimony establishing that it was the practice of the T. W. O. C. to admit employees to membership without formation of a local union until recognition by the employer had been obtained. If there were inconsistency between this practice and the T. W. O. C.'s regulations, which there is not, such an *ultra vires* matter could not be asserted by respondent as a basis for contesting the T. W. O. C.'s majority designation or its authority to represent those employees who had designated it.

resentative by ballot. If, as the Board found,[2] a majority of respondent's employees designated the T. W. O. C. as their representative, the asserted ineligibility of the employees for T. W. O. C. membership prior to formation of a local union is wholly immaterial. There was and is no issue as to membership; the issue here, as always, is only as to designation or selection of a representative.

Respondent does not contend that the T. W. O. C. was incapacitated, under the contract and the regulations, from representing the employees who had designated it. Paragraph 2 (d) of the contract (quoted at p. 35 of respondent's brief) expressly authorizes the T. W. O. C.

> To deal with employers of textile workers and execute agreements on an industry, employer, or any other basis in the discretion of the Textile Workers Organizing Committee.

Respondent's extended argument based upon the contract and the T. W. O. C. regulations is without merit.[3]

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[2] The Board's findings (R. 660, 662–663) are that "at all times since April 4, 1937, the majority of the respondent's employees in an appropriate unit had designated the T. W. O. C. as their bargaining agent" and that "By virtue of Section 9 (a) of the Act, Textile Workers Organizing Committee, having been designated as their representative by a majority of the employees in an appropriate unit, was on April 4, 1937, and at all times thereafter has been, the exclusive representative of all employees in such unit for the purposes of collective bargaining."

[3] Further, this objection to the capacity of the T. W. O. C. to represent respondent's employees may not be urged

2. At pages 47–54 of its brief, respondent contends that the white application cards (Bd. Exh. 15, set forth at p. 32 of Board main brief) did not constitute a designation of the T. W. O. C. Each employee who signed a card of this type agreed to have "an affiliated union of the C. I. O. . . . act as my collective bargaining agency." As we have pointed out in our main brief (pp. 33–34), the employees intended to designate the union affiliated with the C. I. O. having jurisdiction over textile workers, and that union was the T. W. O. C. And even if those who signed the white cards had no specific "affiliated union" in mind, nevertheless they authorized bargaining on their behalf by such affiliated union as the C. I. O. utilized. The T. W. O. C. is the union so utilized and the union which, pursuant to the employees' designation, sought to bargain on their behalf.

In addition, respondent's contention based upon the form of the cards may not now be raised. Section 10 (e) of the Act provides that

> * * * No objection that has not been urged before the Board, its member, agent

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by respondent, since it was not raised before the Board. Section 10 (e) of the Act, *infra*, pp. 4–5. In its detailed Exceptions to the Intermediate Report (R. 602–629) respondent did not raise any objection based upon the contract or the regulations; on the contrary, respondent plainly relied exclusively upon the contention that the Federation represented a majority of the employees on and after April 9th, and that the T. W. O. C. therefore could not have retained its prior representation at the time of the refusal to bargain (see *infra*, p. 7).

> or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances * * *.

Respondent never raised its present contention during the proceeding before the Board and no extraordinary circumstances are asserted to excuse such failure. Not only did respondent fail to raise the objection, but at every point in the proceeding where objection was necessary respondent acquiesced in the consideration of the white cards, and a compiled list including both them and the membership cards, as proper proof of the allegation of the complaint (R. 11) that the T. W. O. C. had been designated by a majority of the employees. Thus, the principal proof adduced to establish the T. W. O. C. majority consisted of Board Exhibit 20 (R. 534–552), a compilation of the names appearing upon both types of cards, introduced in lieu of the cards themselves. Respondent's counsel examined the cards to check the accuracy of the list, and thereupon stipulated that the list was accurate (R. 340–341, 426). The exhibit is entitled "List of respondent's employees who signed 'Textile Workers' cards before April 10, 1937. Total 481" (R. 534). No attempt was made to distinguish between the two types of cards.[4] Identical procedure

[4] The list was also captioned "List of employees who signed CIO cards (Board Exhibits 15 and 16) on or before April 10, 1937. Total 481. Sent to Boston" (R. 534). Since there was only one group of 481, it is apparent that

was followed by counsel for the purpose of establishing the names and total number of employees who had designated the Federation (Resp. Exh. 39, R. 561–568; R. 425–428).

This acquiescence was consistently manifested by respondent throughout the hearing before the trial examiner.[5] In his Intermediate Report, the

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the terms "CIO" and "Textile Workers" were used synonymously and that the "affiliated union of the C. I. O." referred to on some of the cards was regarded by all parties as describing the T. W. O. C. Indeed, those names were used interchangeably throughout the hearing.

[5] Respondent's counsel agreed that the T. W. O. C. list did not contain the names of any supervisory employees and took no exception when, in the resultant statement for the record, Board counsel described the exhibit as "a list of the members of the Textile Workers Organizing Committee in the Bradford Dyeing Association" (R. 344). Respondent's counsel, in fact, stated that no supervisors appeared on the list, so that "none of them are members" (R. 345). Other statements made by respondent's counsel are likewise consistent only with an assumption that the application cards constituted proof of the bargaining authority at issue in the case. Thus, counsel asked whether a witness recalled "any of those who signed application cards coming to you later and repudiating their signing or stating that they no longer wanted to be considered as members?" (R. 104). In urging production of the T. W. O. C. dues records, respondent's counsel argued that they were relevant to the question whether the signers "continued to be members" (R. 107) and that since "a number of employees signed application cards for both organizations" (referring to the T. W. O. C. and the Federation), the dues records would indicate "which organization a particular employee or employees should be considered with" (R. 109; see also R. 117–118). When Ashworth, vice president of the Federation, testified that signers of application cards of both organizations had designated

trial examiner expressly found that both the application cards and the membership cards constituted designations of the T. W. O. C. as the signers' bargaining representative (R. 595). Under the Board's Rules and Regulations, respondent was required to set forth in its Exceptions to the Intermediate Report all objections to findings or rulings by the trial examiner which it desired to urge before the Board (Rules and Regulations of the National Labor Relations Board, Series 1, as amended, Art II, Secs. 34, 35). Respondent's exhaustive Exceptions did not challenge the finding that the application cards constituted proper designations; indeed, the Exceptions plainly accepted the application cards as sufficient authorization and proceeded exclusively upon the theory—the theory upon which respondent rested its case—that the designation of the Federation by a majority prior to the refusal to bargain with the T. W. O. C. was inconsistent with continued majority representation by the T. W. O. C. and that respondent's prior recognition of the Federation relieved it of all obligation to bargain with the T. W. O. C.[6] Under these circumstances, respond-

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both as their bargaining representative, respondent's counsel neither objected to the question nor cross-examined on the point (R. 261–262, 277–282). The "Request for Findings" which respondent submitted to the trial examiner contained no proposed finding denying the sufficiency of the application cards (R. 581–583).

[6] Among other things, the Exceptions stated that "the Employees' Federation presented fully as good proof as any

ent's observation (Brief, p. 52) that there was no testimony by any signer of an application card that he understood it as an authorization to the T. W. O. C., is beside the point. Respondent's complete failure to question the application cards, and its express acquiescence in their probative force as designations of the T. W. O. C., rendered such testimony superfluous; there was nothing at issue to which it could be directed. Section 10 (e) (*supra*, pp. 4–5), embodying approved principles of judicial administration, plainly applies and respondent cannot now contend that the application cards did not designate the T. W. O. C. as the bargaining representative of the employees who signed them. *Newcomb* v. *Wood*, 97 U. S. 581; *United States* v. *Atkinson*, 297 U. S. 157; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 662 (C. C. A. 9th); *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 F. (2d) 399, 406 (App. D. C.).

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offered by the C. I. O. as to the number of employees who had joined such Federation" (R. 618) and that "said Textile Workers Organizing Committee had no clear or better evidence than that previously furnished by the Employees' Federation as to the number of members it represented and in fact said Textile Workers Organizing Committee at no time prior to the hearing in this cause submitted to respondent, or even to its attorneys, the cards or any other concrete evidence of membership of respondent's employees in its organization" (R. 622). The Exceptions filed by the Federation likewise accepted the sufficiency of the T. W. O. C. application cards at the time they were signed (R. 640).

II

THE ASSERTED FAILURE OF THE T. W. O. C. TO DISPLAY ITS CARDS TO RESPONDENT WAS NOT THE GROUND UPON WHICH RESPONDENT BASED ITS REFUSAL TO BARGAIN

Respondent contends (Brief, pp. 54–59) that it failed to bargain with the T. W. O. C. because Salerno would not submit the T. W. O. C. cards to Summersby for scrutiny. The culminating refusal to bargain occurred on April 16, 1937. In our main brief (pp. 37–39) we referred to the uncontradicted testimony establishing that the T. W. O. C. made an entirely reasonable offer at that time to prove its majority by submission of the cards to an impartial third person and that, in any event, respondent's failure to see the cards was not the ground upon which it refused to bargain. There was one ground and only one: respondent's prior recognition of the Federation.

Salerno testified that at the conference on April 16 Summersby rejected his offer to submit the cards to a third person on the ground that respondent had already granted exclusive recognition to the Federation (R. 297–298, 304, 306). Summersby testified without qualification that at this conference he would not bargain with the T. W. O. C. because "I had already given sole bargaining rights to the B. D. A. Employees Federation, over a week previous, . . . " (R. 457).[3] In its Exceptions to the

[3] Thereafter Summersby testified that Salerno had failed to produce proof of the majority claimed by the T. W. O. C. (R. 472–473). But Summersby did not testify, with respect

Intermediate Report, respondent unequivocally asserted that its refusal to bargain with the T. W. O. C. was based upon its prior recognition of the Association; nowhere did respondent contend that the T. W. O. C.'s failure to submit its cards to Summersby on April 16 was a ground for the refusal.[8] I is plain that the latter contention is an

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to the April 16 conference, either that he had asked to see the cards or that Salerno's asserted failure to produce proof had anything to do with respondent's refusal at that time to recognize the T. W. O. C. It should be further noted that Summersby also testified that on April 13 Bernard, the federal conciliator, suggested that an election be held to resolve the disputed question of representation. Summersby rejected this proposal on the ground that "they have already established a local union and I have given them sole bargaining privileges, and I do not see that I have any legal rights where I can change my position and consent to your conducting a vote there" (R. 456). Yet respondent insists that Summersby's refusal to bargain with the T. W. O. C., occurring only 3 days later, was motivated principally or exclusively by Summersby's doubts that the T. W. O. C. represented a majority and by Salerno's failure to resolve those doubts by subjecting the cards to Summersby's scrutiny.

[8] The Exceptions attribute the refusal to the fact that Summersby could not recognize the T. W. O. C. "without violating his recognition of the Employees' Federation and his obligation to deal with it exclusively . . ." (R. 615). Respondent claimed that Summersby did not refuse to bargain "but that he stated he had already recognized another union and that he was not at liberty, therefore, to bargain with the C. I. O. . . ." (R. 619). It is further stated that when respondent "was requested to bargain it merely pointed out that it had previously recognized another union and that in accordance with such recognition it must deal only with such other union as the exclusive representative of its employees . . ." (R. 622). Respondent claimed that the

afterthought which in fact had nothing to do with respondent's refusal to bargain. Since the T. W. O. C. did represent a majority and there was a valid request for bargaining, respondent may not now rely upon asserted doubts as to majority which were not the reason for the refusal. See cases cited at page 38 of Board main brief.

III

IN IMPORTANT PARTICULARS, THE RECORD DOES NOT SUPPORT RESPONDENT'S STATEMENT OF FACTS CONCERNING THE ALLEGED EFFORTS OF NELSON TO PROMOTE A SIT-DOWN STRIKE

We stated in our main brief (pp. 71–72, 27–28) that there is no evidence whatsoever connecting Rhodes, the employee who urged his co-workers to "sit down," with the T. W. O. C. or with the alleged efforts of Nelson to promote a sit-down strike. We further pointed out (pp. 70–71) that the evidence adduced with respect to Nelson's efforts did not implicate Schofield, the other discriminatorily discharged employee, at all. Respondent nevertheless asserts, without reference to any supporting evidence, that Schofield as well as Nelson attempted to promote a sit-down strike (pp. 80, 84, 86, 87, 89, 90) and that these efforts

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trial examiner's finding of an unlawful refusal to bargain was "erroneous for the reasons stated in exception 49 . . ." (R. 623). Exception 49 did not allude to the T. W. O. C.'s refusal to submit its cards to Summersby, but stated that respondent would not bargain with the T. W. O. C. for the reason that it had already granted exclusive recognition to the Federation (R. 621–622).

were made "in conjunction with Rhodes acting inside the plant" (pp. 84, 80, 89) and at the same time as his efforts (pp. 80, 89). Utterly without proof of any connection between Rhodes and the T. W. O. C. or the C. I. O., it characterizes Rhodes' actions as an "attempt to stage a C. I. O. sit-down" (p. 81). These assertions in the brief are entirely without support in the record.[9]

IV

RESPONDENT'S CONTENTIONS WITH RESPECT TO NELSON'S DISCHARGE ARE WITHOUT MERIT

Respondent contends (Brief, p. 83) that the Board is in error in stating (main brief, pp. 62–

[9] Respondent (Brief, p. 89, note) takes issue with our statement (Board main brief, pp. 74–75, note 47) that the alleged threats by Nelson to blow up the railway spur, now relied upon by respondent as a ground for denying reinstatement to him, were not raised before the Board. Respondent's Exceptions, quoted only in part in respondent's brief, opposed the reinstatement of both Schofield and Nelson because those employees "have been working for the C. I. O. doing organizing work and fulfilling the duties of officers of a local unit of the C. I. O. and acting in a manner directly hostile to the interests of respondent, including an attempt to cause a sit-down strike and otherwise to cause respondent's employees to become dissatisfied and to cause unrest and disturbance of the business activity of respondent . . ." (R. 625). This is surely an obscure medium for raising the threats now deemed so important by respondent. We submit that Section 10 (e) (*supra*, pp. 4–5) may not be avoided by vague coverall objections sufficiently ambiguous to cover a variety of possible contentions lurking in the record.

63) that the principal ground to be considered in connection with Nelson's discharge is his asserted lateness in starting work on April 3. It is said that there were other reasons for Summersby's action: Nelson's "irresponsibility" (p. 74); the fact that he entered the plant without permission on April 1 (*ibid.*); the assertion that he "interfered with the work of other employees" (*ibid.*); the assertion that he rudely interjected himself into a conversation between Summersby and Schofield on April 2 (p. 75); and, finally, the assertion that Nelson entered Summersby's office without knocking on the same day (pp. 75–76).

The short answer is that respondent, in relying upon these various grounds, completely ignores the significant circumstance that after Summersby was well aware of whatever basis in fact they had, he still continued his efforts to have Nelson turn his organizing efforts from the T. W. O. C. to an "inside" union (Board main brief, pp. 61–62, 65–66). The list of reasons why Nelson should be eliminated led to no action by respondent so long as Nelson was considering Summersby's proposal; but when, on April 3, Nelson failed to respond to Summersby's wishes, he was discharged. Respondent's argument that the discharge was not discriminatory not only disregards this highly significant sequence of events but also ignores the other ample evidence upon which the Board's findings are

based, including that of Dudley, respondent's foreman (Board main brief, pp. 63–65).[16]

V

THE ORDER REQUIRING RESPONDENT TO BARGAIN WITH THE T. W. O. C. IS VALID AND SHOULD BE ENFORCED

There should be added to the cases cited in the Board's main brief (pp. 47–60) in support of our position that the bargaining order should be enforced without reference to asserted changes in representation occurring after the refusal to bargain, the decision of the Circuit Court of Appeals for the Fourth Circuit in *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, decided March 11, 1940, after our main brief herein was filed. In the *Highland Park* case the employer asserted before the court that the union's majority had been dissipated after the refusal to

[16] Respondent also relies (p. 80) upon Nelson's asserted threats to blow up the railway tracks and his alleged attempts to incite a sit-down strike in justification for the discharge. Respondent admits that all of these acts, if they occurred at all, took place on April 8, five days after Nelson's dismissal. Further, they were not mentioned by Summersby in his conferences with Salerno, at which he refused to take Nelson back (see note 40, p. 62, Board main brief). Respondent's Exceptions to the Intermediate Report stated merely that Summersby's punishment of Nelson on April 3 was "for inefficiency, insubordination and defiance" (R. 609, 611–612), and that Schofield and Nelson were eliminated "for violation of reasonable rules for conduct of the work of respondent and because their conduct detracted from the efficiency and smooth running of the business of respondent and tended to cause delay and interruption in respondent's business" (R. 621).

bargain and applied for leave to adduce additional evidence in support of this claim. The court denied the application and entered a decree enforcing the bargaining order. The pertinent position of the court's opinion, delivered by Judge Parker, reads as follows:

> We do not think that the motion to remand the cause to the Board for the taking of additional testimony should be allowed. Respondent is not faced with conflicting claims as to representation, but raises the question as to the authority of the union to represent its employees as a means of escaping any obligation to bargain at all. In such case it is reasonable to presume that the authority of the bargaining agent continues until the contrary be shown. See *N. L. R. B.* v. *Remington-Rand*, 2 Cir. 94 F. 2d 862, 870; *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 9 Cir. 96 F. 2d 197, 198; *N. L. R. B.* v. *Louisville Refining Co.*, 6 Cir. 102 F. 2d 678. And we think that no sufficient showing is made to overcome this presumption. There are filed ten blanket affidavits in general form by employees of respondent, who are not shown to have any particular knowledge of the matters to which they testify, and whose affidavits amount to little more than expressions of opinion of little or no value. This is all except an affidavit by a former president of the union, which fails to set forth any definite information as to the present membership of the union, and thus discounts the

whole effort to establish loss of majority representation.

It is reasonable to assume, moreover, that any decline in union membership has been due in large measure to refusal of respondent to bargain with the union as representative of the employees in the manner contemplated by the Act of Congress; and, in such situation, an order requiring respondent to bargain as contemplated by the Act is reasonably necessary to overcome the effect of the interference with self organization resulting from the refusal to bargain. An employer should not be allowed to discredit a bargaining agent selected by an overwhelming majority of his employees by refusal to bargain with it and then take advantage of the loss of membership due to his wrongful act as an excuse for refusing to recognize it as a bargaining agent. It must be remembered that the union represents the employees, not the employer; and, if a majority of the employees are not satisfied to be represented by it, they can apply to the Board for relief. It is significant that, while the affidavits filed before us state that a majority of the employees are not members of the union and that for some time it has not been the designated or selected representative of the majority, there is nothing in them to the effect that the employees are not willing to have it bargain for them. If respondent's refusal to bargain had been due to bona fide belief at the time that the union did not rep-

resent a majority, a different situation would, of course, be presented; but it is admitted that at that time the union represented between 80 and 85 percent of the employees. Under such circumstances, we feel that we should decide the case on the record certified by the Board (*N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, — U. S. — 60 S. Ct. 203, 208) and leave any question of representation which may have arisen out of changed conditions since the record was made to be dealt with by the Board under the provisions of the Act.

Respectfully submitted.

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MARCH 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940